

# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statutes and rule involved .....	2
Statement .....	3
Introduction and summary .....	6
Argument:	
The trial court properly refused to instruct the jury that it should find respondent guilty only of violating Section 7207 if it believed he acted capriciously or carelessly in filing returns which he knew to be false as to material matters. ....	11
A. Respondents requested instructions incorrectly charged that the willfulness element of Section 7207 is lower than that of Section 7206(1) and may be satisfied by a finding that a defendant was careless or capricious in filing a tax return actually known by him to be false as to material matters. ....	13
1. Respondent's proposed instructions and the decision of the court below incorrectly assume that all tax misdemeanors involve a lower standard of willfulness than is required for conviction of a tax felony. ....	14
2. The degree of willfulness required for a conviction of the misdemeanor under Section 7207 is no less than that required for conviction of the felony under Section 7206(1) and would not be satisfied by a finding that a defendant was merely careless or capricious in filing a tax return actually known by him to be false as to material matters. ..	17

	Page
B. The misdemeanor under Section 7207 is not a lesser offense included within the felony under Section 7206(1), because the requirement of knowledge of falsity in the misdemeanor is not an element of the felony. ....	21
Conclusion .....	23
Appendix .....	25

## CITATIONS

### Cases:

<i>Abdul v. United States</i> , 254 F.2d 292 .....	6
<i>Berra v. United States</i> , 351 U.S. 131 .....	7
<i>Escobar v. United States</i> , 388 F. 2d 661, certiorari denied, 390 U.S. 1024 .....	8
<i>Government of Virgin Islands v. Aquino</i> , 378 F. 2d 540 .....	23
<i>Haner v. United States</i> , 315 F. 2d 792 .....	19
<i>Hartzel v. United States</i> , 322 U.S. 680 .....	19
<i>Heindel v. United States</i> , 150 F. 2d 493 .....	19
<i>James v. United States</i> , 238 F. 2d 681 .....	23
<i>Kelly v. United States</i> , 370 F. 2d 227, certiorari denied, 388 U.S. 913 .....	23
<i>Sansone v. United States</i> , 380 U.S. 343. 7, 8, 10, 15, 16, 17, 18	
<i>Seven Cases v. United States</i> , 239 U.S. 510 ..	19
<i>Sivaro v. United States</i> , 377 F. 2d 469 .....	12
<i>Sparf and Hansen v. United States</i> , 156 U.S. 51 .....	7
<i>Spies v. United States</i> , 317 U.S. 492 .... 16, 17, 19	
<i>Stevenson v. United States</i> , 162 U.S. 313 .....	21
<i>United States v. Achtner</i> , 144 F. 2d 49 .....	19
<i>United States v. Illinois Central R. Co.</i> , 303 U.S. 239 .....	17
<i>United States v. Murdock</i> , 290 U.S. 389. .... 16, 17	
<i>United States v. Vitiello</i> , 363 F. 2d 240 .... 16, 19	

	Page
<i>United States v. Whitaker</i> , 447 F. 2d 314 . . . . .	8
<i>Waker v. United States</i> , 344 F. 2d 795 . . . . .	23
Statutes:	
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 7201 . . . . .	12, 15, 16, 18
Sec. 7203 . . . . .	15, 16, 19
Sec. 7206(1) . . . . .	2, 3, 4, 8, 9, 10, 12, 13, 14, 18, 20, 21
Sec. 7207 . . . . .	2, 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 22
18 U.S.C. 1621 . . . . .	21
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 31 . . . . .	3, 6, 11, 21
1 National Commission on Reform of Federal Criminal Laws, <i>Working Papers</i> (1970) . . . . .	22
Silving, <i>The Oath</i> , 68 Yale L.J. (1959) . . . . .	22
3 Wharton, <i>Criminal Law</i> (Anderson ed., 1957) . . . . .	22
2 Wright, <i>Federal Practice and Procedure:</i> <i>Criminal</i> § 515 (1969) . . . . .	7, 8, 21

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-18) is reported at 455 F. 2d 612.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on February 11, 1972, and a petition for rehearing, with suggestion of rehearing *en banc*, was denied on April 28, 1972 (Pet. App. 20). On May 27, 1972, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until June 30, 1972.

The petition for certiorari was filed on June 27, 1972, and was granted on October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether respondent, who was charged with an income tax felony under 26 U.S.C. 7206(1), was entitled to a lesser-included offense instruction invoking a tax misdemeanor statute, 26 U.S.C. 7207, on the ground that the willfulness standard in the misdemeanor statute is both lower than that in the felony statute and also may be satisfied by a finding that respondent merely acted capriciously or carelessly in filing tax returns known to be materially false or fraudulent.

#### STATUTES AND RULE INVOLVED

Sections 7206(1) and 7207 of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1) and 7207, in pertinent part provide:

Section 7206(1).

Any person who—

(1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter\* \* \*

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or

imprisoned not more than 3 years, or both, together with the costs of prosecution.

Section 7207.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both.\* \* \*

Rule 31(c) of the Federal Rules of Criminal Procedure in pertinent part provides:

The defendant may be found guilty of an offense necessarily included in the offense charged \* \* \*.

STATEMENT

A three count indictment returned in the United States District Court for the Eastern District of California charged that respondent, under the penalties of perjury, willfully made and subscribed income-tax returns which he did not believe to be true and correct as to every material matter, in violation of 26 U.S.C. 7206(1). Respondent was convicted as charged after a jury trial. He was fined \$5,000 and sentenced to 90 days' imprisonment in a jail-type institution (to be served during 45 consecutive 48-hour weekends) and to five years' probation. The court of appeals, however, reversed and remanded for a new trial, holding that respondent was erroneously denied an instruction to

the jury on what the court concluded was a lesser included offense.

1. Respondent, a practicing attorney, was prosecuted for the felony of willfully filing false income tax returns for 1963, 1964, and 1965, in violation of 26 U.S.C. 7206(1). The returns were false in that they significantly overstated the deductible expenses of a walnut ranch which he owned (Tr. 861-862; 947).<sup>1</sup> At trial respondent did not dispute the falsity of the returns (Tr. 869-870, 1148).

The walnut ranch was managed by respondent's stepmother (Tr. 72). Respondent gave her weekly checks which she deposited to a separate bank account, and she paid the ordinary operating expenses of the ranch from that account (Tr. 73-77). At the end of each year respondent's stepmother provided him with a detailed accounting of all deductible ranch expenses which she had paid during the year (Tr. 81-84, 91, 95, 135, 162, 168). Respondent deducted these items as ranch expenses on his income tax returns. However, respondent additionally deducted as ranch expenses the amounts which he had furnished to his stepmother during the year (Tr. 861-862). In this way respondent in effect took two deductions for each item of ranch expense his stepmother paid: he took one deduction for the initial transfer of funds to her and a second deduction for the actual expenditure by her (Tr. 576).

Furthermore, the amount respondent paid over to his stepmother covered not only ranch expenses but also a substantial number of nondeductible personal items,

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<sup>1</sup> "Tr." refers to the trial transcript, a copy of which is being lodged with the Clerk of this Court.

including his weekend entertainment expenses at the ranch (Tr. 73-74). In addition, respondent improperly claimed deductions for the educational expenses of his stepmother's son, which he had paid, and for the repayments of the principal on a number of loans (Tr. 861-862). The aggregate amount of improper deductions taken by respondent for the three years exceeded \$45,000 and was substantial in relation to his gross income.<sup>2</sup>

When Internal Revenue Service agents interviewed respondent concerning his underreporting, he claimed that his secretary had assisted him in preparing his returns by furnishing him with a schedule of all business-related disbursements from his checking account and that he had relied upon her to delete all nondeductible items (Tr. 813).

2. Respondent contended at trial that he had no knowledge of the falsity of the statements of ranch expenses contained in his returns (Tr. 870, 891, 893, 911, 916, 917, 1148-1150). However, he requested that the jury be charged on the misdemeanor offense of willfully filing false statements, in violation of 26 U.S.C. 7207, which he contended was a lesser offense included in the felony with which he was charged. His three requested in-

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<sup>2</sup> The following table partially reconstructs respondent's income tax returns (Gov't. Exs. 1-3) for the years in question and illustrates the substantial underreporting of income:

	1963	1964	1965
Gross Income	27,907	19,452	22,818
Less: Reported Farm Loss	26,413	19,388	16,046
Reported Total Income	1,494	64	6,772
Plus: Improper Deductions	19,924	17,022	10,063
Actual Total Income	21,418	17,086	16,835

structions (these are set out in the Appendix, *infra*, pp. 25-26) stated in effect that the standard of willfulness in the misdemeanor offense is lower than that in the felony offense and could be satisfied by a finding that he knew the returns to be false as to material matters but acted capriciously or carelessly in filing them. These requested instructions were refused and respondent was convicted of the felonies as charged in the indictment.

3. The court of appeals reversed on the ground that the requested instructions should have been given pursuant to Rule 31(c) of the Federal Rules of Criminal Procedure. The court acknowledged that under the evidence presented there was no rational basis, aside from the question of willfulness, for a jury determination that respondent was guilty of the misdemeanor but not of the felony. But the court noted that since its decision in *Abdul v. United States*, 254 F. 2d 292 (C.A. 9), it had "repeatedly interpreted the word 'willfulness', as used in a [tax] misdemeanor statute, to mean something less than the same word 'willfulness' used in a [tax] felony statute" (455 F. 2d at 614; Pet. App. 16). The court then stated the willfulness standards for the statutes involved here in the following terms (455 F. 2d at 614-615; Pet. App. 17):

\* \* \* "wilfulness," within the meaning of Section 7206(1) [the felony statute], requires proof of an evil motive and bad faith. Evidence under Section 7207 [the misdemeanor statute] need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed.

## INTRODUCTION AND SUMMARY

Rule 31(c) of the Federal Rules of Criminal Procedure permits the jury to find a defendant guilty of a lesser offense necessarily included in the offense charged. This incorporates the prior common law doctrine that a defendant is entitled to have the jury instructed as to a lesser-included offense. See, generally, 2 Wright, *Federal Practice and Procedure: Criminal* § 515 (1969). Insofar as is here relevant, the lesser-included offense doctrine has two major qualifications. The first qualification is that the doctrine only applies where the lesser offense contains some but not all of the elements of the greater offense and, under the evidence presented, the jury may rationally conclude that the defendant was guilty of the lesser offense but not guilty of the greater; an instruction on the lesser offense need not be given where the evidence does not permit the jury rationally to find the defendant guilty of the lesser offense only. *Sansone v. United States*, 380 U.S. 343; *Berra v. United States*, 351 U.S. 131; *Sparf and Hansen v. United States*, 156 U.S. 51. In short, "[t]he lesser-included offense doctrine does not apply if the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses \* \* \*." 2 Wright, *supra*, at 374. As this Court has noted, this limitation on the lesser-included offense doctrine is necessary, for "to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." *Sansone v. United States*, *supra*, at 350, n. 6.<sup>3</sup> Furthermore, conviction of

only the misdemeanor in such circumstances frustrates legitimate exercise of the prosecutor's discretion. Cf. *United States v. Whitaker*, 447 F. 2d 314, n. 8 (C.A. D.C.).

Secondly, the lesser-included offense doctrine also does not apply if an element required for the lesser (less serious) offense is not contained in the greater (more serious): "In this situation two different crimes are involved, and the lesser is not necessarily included in the greater, since it would be possible to commit the greater without also having committed the lesser." 2 Wright, *supra*, at 374-375.

The greater and lesser tax offenses involved in this case are Sections 7206(1) and 7207 of the Internal Revenue Code of 1954. Section 7206(1) makes it a felony willfully to make and subscribe, under the penalties of perjury, any return or other document without believing it to be true and correct as to every material matter. Section 7207 makes it a misdemeanor willfully to deliver or disclose any document known to be fraudulent or false as to any material matter. The offenses unquestionably differ in several respects. One obvious difference is that the felony requires that the document

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<sup>3</sup> The Court there further noted that this limitation on the lesser-included offense doctrine is especially appropriate in cases involving prosecutions for tax felonies which do not impose minimum penalties: "[t]he lack of minimum penalties \* \* \* denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone v. United States*, *supra*, at 350, n. 6. Respondent was prosecuted under 26 U.S.C. 7206(1), which carries no minimum penalty.

be signed by the accused under the penalties of perjury, but the misdemeanor does not even require that the document be signed. See *Escobar v. United States*, 388 F. 2d 661, 666 (C.A. 5), certiorari denied, 390 U.S. 1024. This distinction, however, would not have supported a lesser included offense instruction in this case. Respondent properly conceded at trial (*e.g.*, Tr. 870) and in his brief below (at pp. 13-14), and the court of appeals recognized (455 F. 2d at 614, n. 3; Pet. App. 17, n. 3), that his income tax returns for the prosecution years had in fact been made and subscribed under the penalties of perjury.<sup>4</sup>

### A

The court below also regarded the "willfulness" elements of the two statutes to reflect a distinction between them—and this raises the central dispute in this case. Respondent's requested lesser-included offense instructions (App., *infra*, pp. 25-26) had stated that the standard of willfulness for a misdemeanor conviction under Section 7207 is lower than that for a felony conviction under Section 7206(1) and could be satisfied by a finding that respondent was careless or capricious in filing tax returns actually known by him to be false as to material matters. The court of appeals, reasoning generally that the willfulness requirements of tax misdemeanors are lower than those of tax

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<sup>4</sup> The offenses also differ in that, although the felony applies only to the person making and subscribing the document, the misdemeanor applies also to the person who delivers it. However, this further distinction between the offenses is not relevant to the present case.

felonies, held that the instructions should have been given. But this Court has not interpreted willfulness requirements on the basis of an arbitrary distinction between misdemeanors and felonies. The question properly turns on ascertaining what Congress intended to require in a particular statute when it has made "willfulness" an element of the crime. Proper construction must take account of the nature of the activities proscribed by the statute.

Thus, for example, in *Sansone v. United States*, 380 U.S. 343, the Court applied a volitional standard of conscious, deliberate intent under Section 7207. Such a standard is necessary in light of the statute's requirement of knowledge of falsity. The words "fraudulent" and "false" in Section 7207 imply not mere carelessness but design and intent to deceive. Thus respondent's instructions were properly denied by the district court for misstating the willfulness element of the lesser offense. But even if a volitional standard of careless or capricious behavior were deemed appropriate for Section 7207, there is in any event no basis for concluding that Section 7206(1) prescribes a higher standard of willfulness than does Section 7207. And if both statutes employ the same standard of willfulness, the misdemeanor cannot, under the facts of this case, be a lesser-included offense with respect to the felony.

## B

Moreover, even if the standards of willfulness in the two statutes are different, the misdemeanor cannot in any event be considered a lesser offense *included* in the felony, for the lesser offense here contains an element

not found in the greater. The misdemeanor requires that the accused knew the statement was false, while the felony requires only that the accused did not believe the statement he made to be true. Knowledge of actual falsity is different from the lack of subjective belief of truthfulness. It requires an additional and different finding. Thus an instruction permitting conviction of the misdemeanor was not required by Rule 31(c), which speaks only of "an offense *necessarily included* in the offense charged \* \* \*" (emphasis added). Furthermore, the lesser-included offense doctrine should not be extended to allow a jury to find an *additional* fact not material to the determination of a defendant's guilt of the offense charged, and then to dispense mercy by convicting him of a less serious offense on the basis of that finding.

#### ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT IT SHOULD FIND RESPONDENT GUILTY ONLY OF VIOLATING SECTION 7207 IF IT BELIEVED HE ACTED CAPRICIOUSLY OR CARELESSLY IN FILING RETURNS WHICH HE KNEW TO BE FALSE AS TO MATERIAL MATTERS.

The issue in this case is the soundness of the holding below that "it was error to reject an instruction embodying Section 7207, as a lesser included offense" (455 F. 2d at 615; Pet. App. 18). Our position is that all of respondent's proposed instructions on this point, and the somewhat different focus of the court of appeals, rest on a legally erroneous premise about the standard of willfulness in the two statutes.

Respondent tendered three proposed instructions set-

ting forth his theory as to why and how Section 7207 is a lesser offense included in Section 7206(1) (App., *infra*, pp. 25-26). One of these may be readily disposed of at the outset. Respondent's requested Instruction No. 29 would have charged the jury that "the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction [under Section 7206(1)]." This instruction was plainly unwarranted as a misstatement of the elements of the felony offense for which respondent was being tried. It is not an element of the offense under Section 7206(1) that the false statement relate to the amount of tax due. Section 7206(1) merely proscribes the making of false declarations under the penalties of perjury, without regard to whether the declarant's tax liability has been misrepresented. *Sivaro v. United States*, 377 F. 2d 469 (C.A. 1). By offering Instruction No. 29, respondent was trying to raise the government's burden of proof to that required for a conviction under Section 7201 of the Code, which relates specifically to willful attempts to evade or defeat tax.<sup>5</sup> Therefore, even assuming the correctness of the decision of the court of appeals on the issue of the willfulness and the general

<sup>5</sup> In other words, the jury would have been led to believe under Instruction No. 29 that the government was required to show not only that respondent's statements of expenses were false but also that he had no other items of deduction which might have justified his reported tax liability.

Instruction No. 29 is also objectionable for misstating the degree of willfulness required for conviction of misdemeanors generally. As is discussed at pp. 14-17, *infra*, the court below in accepting this theory has erroneously held that the same willfulness standard applies to all tax misdemeanors.

propriety of a lesser-included offense instruction under the facts of this case, respondent's requested Instruction No. 29 was properly denied by the district court. We now turn to the principal issue, that of the meaning of willfulness in the two statutes.

**A. Respondent's Requested Instructions Incorrectly Charged That the Willfulness Element of Section 7207 Is Lower Than That of Section 7206(1) and May Be Satisfied by a Finding That a Defendant Was Careless or Capricious In Filing a Tax Return Actually Known by Him To Be False As To Material Matters.**

The crux of respondent's contention in this case is contained in the first paragraph of his requested Instruction No. 28:<sup>6</sup>

If \* \* \* you are convinced beyond a reasonable doubt that the defendant *knew the return to be false* as to a material matter, *and that he acted with a bad purpose or without reasonable cause, or capriciously, or with careless disregard*, but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return. [Emphasis added.]

Thus, the first issue in this case is whether the willfulness element of Section 7207 is lower than that in Section 7206(1) and may be satisfied by a finding that a defendant was careless or capricious in filing a tax

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<sup>6</sup> The principal statement in respondent's requested Instruction No. 27 was that the misdemeanor "required a lesser degree of willfulness" than the felony. This theme was amplified in Instructions 28 and 29.

return actually known by him to be false or fraudulent as to material matters.<sup>7</sup>

**1. RESPONDENT'S PROPOSED INSTRUCTIONS AND THE DECISION OF THE COURT BELOW INCORRECTLY ASSUME THAT ALL TAX MISDEMEANORS INVOLVE A LOWER STANDARD OF WILLFULNESS THAN IS REQUIRED FOR CONVICTION OF A TAX FELONY.**

The major premise underlying respondent's proposed instructions and accepted by the court of appeals is that tax misdemeanors necessarily involve a lower

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<sup>7</sup> Although the court below reversed because of the failure to give respondent's lesser-included offense instructions, accepting respondent's theory about the different levels of willfulness, the court focused explicitly on a different factual application than had respondent. While respondent talked about carelessness in filing a document known to be false, the court below stated that "[e]vidence under Section 7207 need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed" (455 F.2d at 615; Pet. App. 17). But this description of what would be sufficient to convict under Section 7207 cannot be reconciled with the statutory language. An element of the offense under Section 7207 is knowledge of the falsity of the statement submitted: the offense proscribed is the willful disclosure or delivery of any document "*known* by [the accused] to be fraudulent or to be false as to any material matter" (emphasis added). But the court below apparently would sustain the conviction under Section 7207 of one who had no knowledge of the falsity of his statement but had simply disregarded its truth or falsity through carelessness or capriciousness. In reading the requirement of knowledge of falsity out of the statute the court of appeals was clearly in error.

Although one who, acting with capricious disregard for the truth, had no knowledge of the falsity of his statement could not be guilty of violating Section 7207, he arguably could be guilty of violating Section 7206(1), which requires not knowledge of falsity but rather an absence of belief that the statement is true, if the statement is submitted under penalties of perjury. See *infra*, pp. 21-23.

standard of willfulness than do tax felonies.<sup>8</sup> This position is wrong.

In *Sansone v. United States*, 380 U.S. 343, a taxpayer was charged with the felony of willfully attempting to evade taxes in violation of Section 7201 of the Code. The taxpayer requested instructions that he could be acquitted of the felony charge but convicted of violating Section 7207, the misdemeanor offense also involved in the present case.<sup>9</sup> After finding that under the circumstances, the two statutes prohibited the same acts, the Court concluded (at 353):

\* \* \* [I]f, as the jury obviously found, *petitioner's act was willful in the sense that he knew that he should have reported more income than he did* \* \* \* he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither. \* \* \* [O]n the facts of this case, §§ 7201 and 7207 "covered precisely the same ground," \* \* \* and thus petitioner was not entitled to a lesser-included offense charge based on § 7207. [Emphasis added.]

This Court in *Sansone* thereby determined that Congress has established the *same* volitional standard of

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<sup>8</sup> The court below stated categorically: "In income tax prosecutions this circuit has repeatedly interpreted the word 'willfulness,' as used in a misdemeanor statute, to mean something less than the same word 'willfulness' used in felony statute" (455 F.2d at 614; Pet. App. 16).

<sup>9</sup> The defendant in *Sansone* also requested a charge on another misdemeanor offense, Section 7203 of the Code. This Court concluded that the defendant was not entitled to instructions on either misdemeanor.

conscious, deliberate intent for both the felony of willfully attempting to evade tax and the misdemeanor of willfully filing a false statement. See *United States v. Vitiello*, 363 F. 2d 240, 243 (C.A. 3). By applying the same standard under both Section 7201 and Section 7207, this Court in *Sansone* foreclosed the general argument, relied upon by the court below, that tax felonies require a higher degree of willfulness than do tax misdemeanors.<sup>10</sup>

Moreover, the underlying rationale of the decision below, i.e., that conscious intent is never a necessary element of a tax misdemeanor, conflicts with this Court's holdings in *United States v. Murdock*, 290 U.S. 389, and *Spies v. United States*, 317 U.S. 492. *Murdock* involved a prosecution for the misdemeanor of willful failure to supply information for purposes of the computation of a tax, in violation of a predecessor of Section 7203 of the Code, and this Court held that the requirement of willfulness in that misdemeanor statute made "bad faith or evil intent" (290 U.S. at 389) an element of the offense. Similarly, in *Spies* this Court insisted on "some element of evil motive" (317 U.S. at 498) as an element of the misdemeanor of willfully failing to pay a tax under Section 7203 of the Code.<sup>11</sup>

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<sup>10</sup> Respondent has argued (Br. in Opp. 3-4) that the Court in *Sansone* was merely holding that under the facts there the degree of willfulness necessary to establish a felony was present and that it was therefore unnecessary to decide whether a lower standard of willfulness applies to tax misdemeanors. But there is no suggestion in the Court's analysis that the standards of willfulness under the two statutes, although different, were both satisfied; to the contrary, the language of the opinion strongly implies that the standard of willfulness under each statute is the same.

<sup>11</sup> It should be noted that the willfulness standards set for the misdemeanors in *Murdock* and *Spies* are not lower—indeed, they may be higher—than that set for the felony in *Sansone*.

Thus, unlike the court below, this Court has not broadened the willfulness element of tax misdemeanors in general to embrace acts merely committed "without reasonable cause, or capriciously or with a careless disregard \* \* \*" (455 F. 2d at 614; Pet. App. 16-17, *italics omitted*). To the contrary, in *Spies* and *Murdock*, this Court held that the appropriate willfulness standards for the tax misdemeanors there in question were identical to those commonly used in other offenses involving turpitude. See, e.g., *United States v. Illinois Central R. Co.*, 303 U.S. 239, 242.

As the Court noted in *Spies*, "willful \* \* \* is a word of many meanings, its construction often being influenced by its context." 317 U.S. at 497. Accordingly, when reviewing tax prosecutions this Court has interpreted willfulness requirements in light of the particular nature of the activities Congress sought to prohibit and not on the basis of an arbitrary distinction between misdemeanors and felonies.<sup>12</sup>

2. **THE DEGREE OF WILLFULNESS REQUIRED FOR A CONVICTION OF THE MISDEMEANOR UNDER SECTION 7207 IS NO LESS THAN THAT REQUIRED FOR CONVICTION OF THE FELONY UNDER SECTION 7206(1) AND WOULD NOT BE SATISFIED BY A FINDING THAT A DEFENDANT WAS MERELY CARELESS OR CAPRICIOUS IN FILING A TAX RETURN ACTUALLY KNOWN BY HIM TO BE FALSE AS TO MATERIAL MATTERS.**

As is discussed above (*supra*, pp. 15-16), this Court in *Sansone* applied the same volitional standard of conscious, deliberate intent for both the felony under

<sup>12</sup> For example, in *Spies*, where the Court had required "evil motive" for conviction of the misdemeanor of willfully failing to pay a tax, it approved "[m]ere voluntary and purposeful" (317 U.S. at 497-498) conduct as the standard of willfulness for the misdemeanor of willfully failing to file a return.

Section 7201 and the misdemeanor under Section 7207. There are two points to note in connection with this treatment of the issue of willfulness in *Sansone*. First, the misdemeanor which was involved there, Section 7207, is the same statute that respondent here sought to invoke in requesting lesser-included offense instructions. But respondent's requested instructions charged that the element of willfulness in that misdemeanor could be satisfied by a finding of carelessness or capriciousness. This charge is clearly inconsistent with the *Sansone* description of the word "willfully" in Section 7207 as being used "in the sense that [the accused] knew that he should have reported more income than he did" (380 U.S. at 353), and this inconsistency alone would have justified the district court's refusal of the requested instruction. Second, there is no basis in the language, history or purpose of Sections 7201 (the felony involved in *Sansone*) and 7206(1) (the felony of which respondent has been convicted) for concluding that the same word "willfully" describes a higher degree of volition in Section 7206(1) than in Section 7201. Therefore, if, as *Sansone* appears to hold, Sections 7201 and 7207 employ the same test of willfulness, so do Sections 7206(1) and 7207. And, as respondent concedes (Br. in Opp. 2), if the statutes here involved employ the same test of willfulness, the requested instructions were improper.

But respondent's instructions on the issue of willfulness were improper even without regard to *Sansone*. The offense proscribed by Section 7207 is that of willfully delivering or disclosing a statement "*known \* \* \** to be fraudulent or to be false as to any material mat-

ter" (emphasis added). Respondent's requested instructions, which would have charged the jury that he could be convicted of carelessly or capriciously filing a statement he knew to be false, essentially involve a contradiction in terms. The statutory requirement of knowledge of falsity cannot be sensibly reconciled with a volitional standard of mere carelessness or capriciousness. The words "fraudulent" and "false" imply not mere carelessness but design and an actual intent to deceive. See *Seven Cases v. United States*, 239 U.S. 510, 517. Those words denote intentional and deliberate untruth, something beyond mere accidental inaccuracy. *Heindel v. United States*, 150 F. 2d 493, 497 (C.A. 6); *United States v. Achtner*, 144 F. 2d 49, 52 (C.A. 2). In such a setting it is unreasonable to construe the word "willfully" as referring to careless or accidental conduct. Rather, in this context, "the word 'willfully' \* \* \* must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel v. United States*, 322 U.S. 680, 686.

The courts have refused to apply a volitional standard of mere carelessness even under Section 7203, relating to willful failure to file tax returns. *Spies v. United States*, *supra*; *United States v. Vitiello*, *supra*; *Haner v. United States*, 315 F. 2d 792 (C.A. 5). Such a standard would be even less appropriate under a statute like Section 7207 which requires knowledge of falsity or fraud. Furthermore, if respondent knew, as his requested instructions assume, that the tax returns which he prepared and filed contained false statements, it is not clear in what sense his submission of the false statements could ever be considered simply

negligent. In short, respondent's requested instructions did not describe a course of action which Congress could reasonably be deemed to have sought to prohibit under Section 7207, nor did they describe a hypothetical finding of fact which the jury might have reasonably made under the statute; the instructions were in fact nothing more than a disguised invitation to the jury to extend to respondent a leniency having no foundation in the statutory text.<sup>13</sup>

**B. The Misdemeanor Under Section 7207 Is Not a Lesser Offense Included Within the Felony Under Section 7206(1), Because the Requirement of Knowledge of Falsity in the Misdemeanor Is Not an Element of the Felony.**

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<sup>13</sup> There is a further reason why respondent was not entitled to a lesser-included offense instruction in this case. Even assuming, contrary to the above analysis, that Section 7207 may reach merely negligent conduct, there is no apparent basis for holding that the willfulness standard prescribed by Section 7206(1) would be any higher than that required for Section 7207. Indeed, the nature of the offenses suggests that if either statute proscribes mere negligent behavior, it is Section 7206(1) and not Section 7207. Section 7206(1) relates to statements made under the penalties of perjury; the very existence of those penalties should suggest to the declarant the seriousness of the context in which his statements are made; if he nevertheless chooses to be careless or capricious in making statements without believing them to be truthful, he arguably does so at his own peril. Furthermore, a volitional standard of carelessness or recklessness is, if anything, easier to reconcile with Section 7206(1), an offense involving statements made without regard to their truth, than with Section 7207, an offense of knowingly making false statements. Thus, if Section 7207 is to be construed as covering merely careless or capricious behavior, it would not be unreasonable to interpret Section 7206(1) in the same way. And if both statutes employ the same standard of willfulness, even if that be a standard of mere careless or capricious behavior, the misdemeanor cannot, under the facts of this case, be a *lesser*-included offense with respect to the felony.

Rule 31(c), upon which respondent relies, provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged \* \* \*" (emphasis added). This limitation of the rule to lesser offenses necessarily included within the offense charged reflects the historic origin of the lesser-included offense doctrine. That doctrine was "developed at common law to aid the prosecution in cases where the proof failed to show some element of the crime charged" (2 Wright, *supra*, at 372), and its present scope remains true to its original rationale.<sup>14</sup> Thus a lesser-included offense instruction may be given only where a conviction of the lesser offense may be supported on nothing more than a jury finding that the prosecution has succeeded in establishing some, but not all, of the elements of the greater offense. The lesser-included offense doctrine "does not apply if some element is required for the lesser offense but not for the greater." *Id.*, at 374.

The element of *scienter* in Section 7206(1), as in the statutory crime of perjury (18 U.S.C. 1621), is that of an absence of belief in the truth of the statements averred.<sup>15</sup> Thus it was necessary for the prosecution here to show not that respondent knew that his state-

<sup>14</sup> Of course, the application of the doctrine is often considered beneficial to, and may be invoked by, the defendant. See *Stevenson v. United States*, 162 U.S. 313.

<sup>15</sup> Indeed, the traditional view of the common law crime of perjury was that it could be committed by making a true statement if the declarant neither knew it was true nor had probable cause for believing it to be true. 3 Wharton, *Criminal Law* 653 (Anderson ed., 1957). Presumably this view stemmed from the fact that the crime of perjury was originally considered a moral crime or a crime of conscience. See Silving, *The Oath*, 68 Yale L. J. 1329, 1362-1363, 1365, 1381 (1959).

ments of expenses were false but that he did not affirmatively believe they were true.<sup>16</sup> A jury determination of actual falsity and of respondent's knowledge of such falsity was not material in this prosecution. By contrast, establishing knowledge of actual falsity is crucial in a prosecution under Section 7207. The latter statute bars disclosure only of documents "*known \* \* \** to be fraudulent or to be false" (emphasis added). Thus the lesser offense here contains an element—knowledge of falsity—not found in the greater.

The lesser-included offense doctrine should not be extended to permit instructions on additional factual questions, such as the existence of knowledge of falsity here, which need not be resolved in connection with the offense charged.<sup>17</sup> The lower courts have steadfastly refused to extend the doctrine in this way. For example, in prosecutions for serious drug offenses which may be committed either with or without possession of the illegal drug, defendants have been refused instructions on lesser possessory offenses. *Kelly v. United States*, 370 F. 2d 227 (C.A. 1 D.C.), certiorari denied,

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<sup>16</sup> This consideration lends support to the suggestion of the National Commission on Reform of Federal Criminal Laws that the proper volitional standard for such crimes is recklessness. See 1 National Commission on Reform of Federal Criminal Laws, *Working Papers* 660 (1970). The reckless assertion of facts not known to be true, with no reasonable cause for believing them to be true, is a proper subject for criminal sanction, especially in an area, such as the federal income tax laws, in which the government must rely primarily upon honest, candid, and cooperative self-reporting.

<sup>17</sup> It should be noted that since respondent denied any knowledge of falsity (*supra*, p. 5), we are not here confronted with a case where the additional element of the lesser offense has been conceded.

388 U.S. 913; *Waker v. United States*, 344 F. 2d 795 (C.A. 1). See, also, *Government of Virgin Islands v. Aquino*, 378 F. 2d 540 (C.A. 3); *James v. United States*, 238 F. 2d 681 (C.A. 9). In essence, respondent's requested instructions would have charged the jury to find a fact not properly in issue before it and then to dispense mercy, in the form of a conviction for a different crime, involving that new element, but carrying a lesser penalty. Such instructions distort the lesser-included offense doctrine and abuse the jury's proper function. A defendant has no right to insist on such a course, even though it might help him avoid being convicted as charged.

#### CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case remanded for

consideration of the other issues raised by respondent's appeal.

Respectfully submitted.

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## APPENDIX

### DEFENDANT'S REQUESTED INSTRUCTION No. 27

#### (Lesser-Included Offense)

A lesser included offense is an offense made up of some, but not all, of the elements of the offense charged. The crime of willfully delivering a false return includes the following elements:

- (1) That the defendant filed the return; and
- (2) That he knew it to be false as to a material matter.

It differs from the offense charged in the indictment in that:

- (1) It does not require that the defendant willfully signed a declaration under penalty of perjury, and,
- (2) It required a lesser degree of willfulness.

### DEFENDANT'S REQUESTED INSTRUCTION No. 28

#### (Lesser-Included Offense)

If, as to any count, you are convinced beyond a reasonable doubt that the defendant knew the return to be false as to a material matter, and that he acted with a bad purpose or without reasonable cause, or capriciously, or with careless disregard, but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return.

Similarly, if you are convinced beyond a reasonable doubt both that he knew the return to be false as to a material matter and that he had formed the bad or evil purpose of misleading the Government, but you are not satisfied beyond a reasonable doubt that he knew the return contained a declaration that it was made under the penalties of perjury, you should find him guilty of the lesser offense of delivering a false return.

In other words, you should find the defendant guilty of the lesser offense if you have a reasonable doubt either that the defendant knew that what he signed contained a declaration under penalty of perjury, or that he acted with the

specific evil purpose of misleading the Government, but you are satisfied beyond a reasonable doubt as to every other element of the offense as I have described it to you.

**DEFENDANT'S REQUESTED INSTRUCTION No. 29**

**(Willfulness and Misdemeanors)**

The offense charged, willfully making a false return under penalty of perjury, is a felony; whereas the lesser offense of willfully delivering a false return is a misdemeanor. The word willful, as used in misdemeanors, means with a bad purpose or without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act. That the defendant formed the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction of the felony charged, but it is not required for conviction of the lesser misdemeanor offense of delivering a false return.